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Attorneys for Respondents

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION ***E-FILED - 8/24/07***

PERLITO CAPILI SULIT and
 ESTELA SULIT,

Petitioners,

v.

MICHAEL CHERTOFF, Secretary, Department
 of Homeland Security, CHARLES DEMORE,
 District Director, Immigration and Customs
 Enforcement, NANCY ALCANTAR, Field
 Office Director, Immigration and Customs
 Enforcement, and ALBERTO GONZALES,
 Attorney General of the United States,

Respondents.

Case No. C 05-0958-RMW

**STIPULATION TO TRANSFER CASE
 TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT;
 AND [] ORDER**

The petitioners filed the above-entitled petition for writ of habeas corpus on March 7, 2005, alleging, *inter alia*, that the Board of Immigration Appeals' (BIA) entry of a deportation order in the first instance is *ultra vires*, thereby rendering the BIA's March 26, 1996 deportation order a nullity.

On November 7, 2005, this Court granted the respondents' unopposed request to hold the case in abeyance pending resolution of an appeal before the United States Court of Appeals for the Ninth Circuit in *Lolong v. Gonzales*, No. 03-72384, because the parties anticipated that in that case

1 the Ninth Circuit would address: (1) whether the courts of appeals or the district courts have
2 jurisdiction to review the type of claim that petitioner raises in this action, and (2) whether the BIA
3 acts *ultra vires* when it issues a removal order in the first instance rather than remanding to the
4 Immigration Judge for entry of a removal order after there has been an admission or finding of
5 removability.

6 The Ninth Circuit issued its decision in *Lolong* on May 7, 2007.¹ In *Lolong*, the Court of
7 Appeals assumed jurisdiction and rejected the petitioner's argument that the BIA acted *ultra vires*
8 when it entered a removal order in the first instance. *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir.
9 2007) (en banc). The court held that where "the IJ has previously determined that the alien is
10 removable, but grants cancellation of removal, the BIA's decision to reverse the cancellation of
11 removal reinstates the initial finding of removability, which, under the statute, is effectively an
12 order of removal. *Lolong*, 484 F.3d at 1178.

13 The respondents believe that *Lolong* disposes of the petitioners' claim that the BIA acted
14 *ultra vires* when it entered the petitioners' March 26, 1996 deportation order. The petitioner
15 believes that *Lolong* is not controlling since the present action involves a different statutory and
16 regulatory scheme in deportation proceedings commenced and completed before the enactment of
17 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

18 The parties agree that this case must be transferred to the Ninth Circuit pursuant to the REAL
19 ID Act of 2005, which provides that habeas petitions pending in district courts on the effective
20 date of the Act shall be transferred to the court of appeals to be treated as petitions for review. *See*
21 Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311 (May 11, 2005); *Puri v. Gonzales*, 464 F.3d 1038,
22 1041 (9th Cir. 2006).

23 The parties agree that, pending the transfer of the proceedings to the Court of Appeals for the
24 Ninth Circuit and until issuance of notice of docketing of the petition for review, the respondents
25 agree not to deport the petitioners from the United States.

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¹The mandate issued on June 29, 2007.

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2 Dated: August 22, 2007

Respectfully submitted,

3 SCOTT N. SCHOOLS
4 United States Attorney

5 /s/
6 EDWARD A. OLSEN
7 Assistant United States Attorney

8 Dated: August 22, 2007

9 /s/
10 JAMES TODD BENNETT
11 Attorney for Petitioners

12 **ORDER**

13 Pursuant to stipulation, IT IS SO ORDERED.

14 Date: 8/24/07

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16 RONALD M. WHYTE
17 United States District Judge
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